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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEWIS KINCHERLOW, Defendant and Appellant.	B292642 (Los Angeles County Super. Ct. No. MA073837)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed in part, reversed in part.

Rudolph J. Alejo, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun Lee, Deputy Attorney

General, Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Robert Lewis Kincherlow[1] guilty of assault with a firearm (Pen. Code, § 245, subd. (a)(2) [count 2]),[2] and found true the allegation that Kincherlow personally used a firearm in that count (§ 12022.5). It also found Kincherlow guilty of felon in possession of a firearm (§ 29800, subd. (a)(1) [count 5]) and two counts of negligent discharge of a firearm (§ 246.3, subd. (a) [counts 6 and 7]).[3]

The trial court sentenced Kincherlow to a total of eight years eight months in prison as follows: the high term of four years in count 2, plus four years for the gun use enhancement, plus eight months (one-third the middle term of two years) in count 5. In counts 6 and 7, the trial court imposed terms of two years each, to be served concurrently.

On appeal, Kincherlow argues that the trial court erred by failing to: (1) instruct on unanimity with respect to the

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[1] Although the parties refer to appellant as "Kitcherlow," the trial court's records reflect that appellant's last name is Kincherlow, and we use that spelling throughout the opinion.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] Counts 1, 3, and 4 were dismissed.

assault with a firearm charge in count 2, and (2) stay the sentence in count 7, which is based on the same continuous course of conduct as count 6.

We agree with Kincherlow that the trial court's failure to instruct on unanimity in count 2 was prejudicial error. We reverse his conviction for assault with a firearm and the corresponding enhancement for personal gun use, and remand to the trial court for further proceedings. We otherwise affirm the trial court's judgment.

FACTS

Prosecution

On May 16, 2018, Kincherlow's brother Erick was drinking beer with him in front of his house.[4] When they began talking about Kincherlow's wife, Kincherlow got angry. Kincherlow went inside and grabbed a shotgun and began firing into the ground, a nearby trash can, and his own car window. Throughout the incident, Erick told Kincherlow to go inside before neighbors called the police. After Kincherlow shot into the car window Erick began walking away from the house. Erick testified that Kincherlow never pointed the gun at him, he was never

[4] Because Kincherlow and his brother share the same last name, we refer to his brother as Erick throughout this opinion.

afraid of his brother, and he never believed his brother was going to shoot him.

Kincherlow's neighbor J.S. "had a lot of run-ins" with Kincherlow that were unrelated to the shooting incident.[5] On the day of the incident, J.S. was in her car with her children when she heard a loud noise like a gunshot. She saw Kincherlow pointing what appeared to be a long gun into the air. She heard another gunshot and saw Kincherlow's brother walking backwards down the driveway away from the house with Kincherlow following him. Kincherlow pointed the gun at his brother, who repeatedly told him to go back inside. J.S. called the police because she was afraid Kincherlow was going to shoot his brother. Kincherlow shot the gun again.[6] J.S. could not see what Kincherlow hit the third time, but it sounded like he shot a car that he was standing about two feet away from, and which was between him and his brother. "[H]e shot towards the brother, and his brother didn't fall to the ground. But [J.S.] heard a noise, and [she thought] it hit the car instead

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[5] There was considerable testimony regarding the unrelated incidents between J.S. and Kincherlow. The trial court twice instructed the jury that it was to use evidence of these other incidents solely for the purpose of evaluating J.S.'s testimony. The defense called another neighbor, N.J., to impeach J.S.'s credibility regarding an unrelated incident.

[6] J.S.'s testimony is inconsistent as to how many shots Kincherlow fired before she called police.

of him." It appeared to J.S. that Kincherlow was trying to shoot his brother because he kept following him.

After all the shots were fired, J.S. made a video recording of the incident on her cell phone. The video was played for the jury, and depicts Kincherlow moving a rifle between his hands, and arguably pointing the rifle at Erick. After recording the incident for a while, J.S. gathered her children and went inside her house. Kincherlow and his brother were still outside at the time, and the last time she looked at them Kincherlow was still pointing the gun at his brother and looked like he was going to shoot him. The police arrived shortly thereafter.[7]

Los Angeles County Deputy Sheriff Elijah Goffigan responded to the 911 call. When Deputy Goffigan arrived, Kincherlow was belligerent and appeared intoxicated. Deputies eventually detained him in the back of a patrol car.

Deputy Goffigan found a 12-gauge shell casing from a shotgun in the driveway. A second shell casing was recovered near a trash container, and a third shell casing was found by the gutter on the passenger side of a car with a shattered rear window. Deputy Goffigan discovered a loaded 12-gauge shotgun in Kincherlow's living room. A box of 12-gauge shotgun shells and two loose 12-gauge shotgun shells were recovered from the master bedroom. In the first floor bedroom, there were shotgun shells, 45-caliber ammunition,

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[7] J.S. admitted that she had been caught shoplifting when she was a teenager. She was in her thirties at the time of trial.

and loose ammunition inside a prescription bottle with Kincherlow's name on it.

The parties stipulated that Kincherlow had suffered a prior felony conviction.

Defense

Kincherlow's neighbor W.G. was home on the day of the shootings. He heard two shots. He looked outside and saw Kincherlow fire about four shots into a trash pile before firing into a car window. W.G. never saw Kincherlow point the gun at Erick.

DISCUSSION

Unanimity Instruction

Kincherlow contends that the trial court committed reversible error by failing to sua sponte instruct the jury on unanimity with respect to the count of assault with a firearm (count 2). The charge was based on Kincherlow pointing the gun at Erick. Kincherlow argues that the jury could have based its verdict on two separate instances of gun-pointing, and it is therefore impossible to know whether its verdict was unanimous as required. The People counter that the gun-pointing was part of the same continuous transaction, such that the jury was not required to rely on a specific act to reach its verdict. We agree that the failure to instruct

was prejudicial error, and reverse Kincherlow's conviction of assault with a firearm in count 2 and the corresponding enhancement for personal firearm use.

Legal Principles

A jury verdict in a criminal case must be unanimous. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) In addition, the jury must unanimously agree that the defendant is guilty of a specific crime. (*Ibid.*) Therefore, "when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Ibid.*) In the absence of an election, a unanimity instruction is required in order "'to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Ibid.*)

"However, '[t]he unanimity instruction is not required when the acts are so closely connected in time as to form part of one transaction. [Citations.] This branch of the "continuous conduct" exception [citation] applies if the defendant tenders the same defense or defenses to each act and if there is no reasonable basis for the jury to distinguish between them. [Citations.]' (*People v. Crandell* (1988) 46 Cal.3d 833, 875; see also *People v. Maury* (2003) 30 Cal.4th 342, 423.) This exception "'is meant to apply not to all crimes occurring during a single transaction but only to

those 'where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim's testimony in toto.' [Citation.]" [Citation.]' (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.)" (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1010–1011.)

Where warranted, the trial court must give the instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) We review independently whether failure to give a unanimity instruction was error. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.)

"There is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction." (*People v. Vargas* (2001) 91 Cal.App.4th 506, 561 (*Vargas*).) Some appellate cases hold that the failure to instruct on unanimity is of constitutional dimension and apply the test enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), requiring reversal unless the error is harmless beyond a reasonable doubt. (See, e.g., *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.) Other cases apply the test from *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), and hold that a conviction will be overturned only if "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Vargas*, *supra*, at p. 562, citing *Watson*, *supra*, at p. 836.)

Analysis

At trial, the prosecution argued that Kincherlow's action of pointing the gun at Erick formed the factual basis for the assault with a firearm charge, but did not specify which of two instances the charge was based upon.[8] J.S. testified that Kincherlow pointed the gun at Erick before she began recording video with her cell phone and then again later, while she was recording. Thus, the evidence supporting the two claimed instances of gun-pointing differed: J.S.'s testimony was the sole evidence presented in support of the first instance, but J.S.'s testimony and the video recording, which showed Kincherlow handling the gun, were presented in support of the second instance.

Kincherlow contends that the court had a sua sponte duty to instruct regarding unanimity because it was possible for the jury to agree that he pointed the gun at Erick, but disagree as to which instance was the basis for the offense. He reasons that some jurors could interpret the video recording as depicting Kincherlow pointing the gun at his brother in the second instance, but not credit J.S.'s testimony as to the first instance, while other jurors could conclude that the video did not depict Kincherlow pointing the gun at Erick (thus rejecting J.S.'s testimony as to the

[8] The parties agree as to this point and our review of the record confirms that the prosecution did not clearly rely on a single instance of gun-pointing for the assault with a firearm charge.

second instance), but credit J.S.'s testimony as to the first instance. Kincherlow further asserts that the defenses counsel presented at trial differed: he argued both that J.S. was not credible and that the video did not depict him pointing the gun at Erick.

We agree. The continuous conduct exception does not apply in this instance, because although the conduct occurred in the same place in a matter of minutes, the fact that different evidence was offered in support of each instance introduced the possibility that the jury could believe that one instance of gun-pointing occurred while the other did not—as was reflected in the different defenses advanced at trial. Where, as in this case, the jury has a basis to differentiate between the two offenses, either the prosecution must elect one offense or the other, or the jury must be instructed that its verdict must be unanimous. Because the prosecutor did not rely on a specific instance of gun-pointing, the trial court erred by not instructing on unanimity.

We conclude that the error was prejudicial under both the *Watson* and *Chapman* standards. The defense ably attacked J.S.'s credibility at trial, and our review of the video evidence leads us to conclude that reasonable persons could disagree as to whether it depicts Kincherlow pointing the gun at Erick. It is reasonably probable that if the jury had been properly instructed it could have reached a verdict more favorable to Kincherlow. We therefore reverse

Kincherlow's conviction of assault with a firearm in count 2, and remand to the trial court for further proceedings

Multiple Punishment (Section 654)

Kincherlow next contends that the trial court erred in not staying the sentence in count 7 under section 654, because the two counts of negligent discharge of a firearm (counts 6 and 7) arose from a single course of conduct, such that imposition of both sentences constitutes impermissible multiple punishment. We agree with the People that the trial court did not err because the counts are based on two discrete instances in which Kincherlow discharged the gun—the shot he fired into the air (count 6) and the shot he fired into the car (count 7)—and do not punish Kincherlow twice for the commission of a single act.

Legal Principles

"'In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. "In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' [Citations.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) Section 954 generally permits multiple conviction. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment for the same "act or omission." When section

954 permits multiple conviction, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations.]' [Citation.]" (*People v. Sloan* (2007) 42 Cal.4th 110, 116.)

Application of section 654's prohibition against multiple punishment falls into two general categories. The first category—not present here—arises when a single act or omission violates two provisions of the Penal Code. In the second category of section 654 issues, the "statute bars multiple punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective." (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603 (*Moseley*).) Kincherlow relies on this latter principle in this appeal.

"Our case law has found multiple criminal objectives to be a predicate for multiple punishment only in circumstances that involve, or arguably involve, multiple acts." (*People v. Mesa* (2012) 54 Cal.4th 191, 199.) "The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

"Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense." (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) However, "[t]he purpose behind section 654 is 'to insure that a defendant's punishment will be commensurate with his culpability. [Citation.]' [Citation.]" (*People v. Trotter* (1992) 7 Cal.App.4th 363, 367–368, fn. omitted (*Trotter*).) Where the defendant's conduct becomes "more egregious with each successive [act]" and each act "pose[s] a separate and distinct risk to [the victim or victims]," "and [the acts] were separated by periods of time during which reflection was possible," section 654 has been held to apply. (*Id.* at p. 368.)

"We review under the substantial-evidence standard the court's factual finding, implicit or explicit, of whether there was a single criminal act or a course of conduct with a single criminal objective. [Citations.] . . . [W]e review the trial court's conclusions of law de novo." (*Moseley*, *supra*, 164 Cal.App.4th at p. 1603.)

Analysis

Because no objection under section 654 was made in the trial court, and the court made no express findings, we consider whether the trial court's implied findings that

Kincherlow's shot into the air and his shot into the car were separate acts.[9]

Kincherlow's contention is based on his assertion that he harbored the same intent when he fired the shots—to get Erick to leave, and that the shots also shared the same victim—the general public. This argument ignores the fact that two acts may be separate although they occur over a short time period, the defendant's intent is the same, and the victim is identical, when there is time for reflection, such that each act marks a separate decision by the defendant to engage in a criminal act, creates a separate and distinct risk, and increases the defendant's culpability. We agree with the People that those factors are present here, and that the case is analogous to *Trotter*, *supra*, 7 Cal.App.4th 363, where the Court of Appeal held that the trial court did not err in punishing the defendant separately for gunshots at an officer, which occurred approximately a minute apart.

In *Trotter*, the defendant shot at an officer who was pursuing him three times from a moving vehicle. There were no vehicles in between the defendant's vehicle and the officer's vehicle, which were approximately 30 to 50 yards apart. The defendant shot at the officer once, and then,

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[9] "'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' (*People v. Perez* (1979) 23 Cal.3d 545, 549–550, fn. 3.)" (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

approximately a minute later, fired at the officer twice in close succession. (*Trotter*, *supra*, 7 Cal.App.4th at p. 366.)

In holding that the trial court did not err by imposing separate sentences with respect to the first and second shot, the Court of Appeal cited to the Supreme Court's decision in *People v. Harrison* (1989) 48 Cal.3d 321, 337–338, which stated: "'No purpose is to be served under section 654 by distinguishing between defendants based solely upon the type or sequence of their offenses. . . . [I]t is defendant's intent to commit a number of separate base criminal acts upon his victim, and not the precise code section under which he is thereafter convicted, which renders section 654 inapplicable.'" (*Trotter*, *supra*, 7 Cal.App.4th at p. 367.) The *Trotter* court explained, "this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. '[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' (*People v. Harrison*, *supra*, 48 Cal.3d at p. 338.)" (*Trotter*, *supra*, at p. 368.)

The *Trotter* court concluded: "Section 654 is applicable when there is a single 'act.' But here, there were three separate acts, not one 'made punishable in different ways by different provisions of [the Penal Code] . . . .' [Citations.] [¶] But, even under the long recognized 'intent and objective'

test, each shot evinced a separate intent to do violence . . . . It is not the 'nature' of the offenses which governs the applicability of section 654. If this were so, a defendant could be separately punished when the means used to perpetrate an assault were varied, but could not be separately punished if the means remained the same. This would lead to absurd results, and is an approach which *Harrison* condemns. (48 Cal.3d at pp. 330–334.)" (*Trotter*, *supra*, 7 Cal.App.4th at p. 368, fn. omitted.)

Here, Kincherlow shot into the air while standing by his house (count 6), shot into a garbage pile (not charged), and then walked toward the street where his brother had retreated. He stood in the area near the street moving the gun around several times in his hands before shooting into a parked vehicle (count 7) located between Erick and himself. On the audio recording of J.S.'s call to police there is a loud gunshot at approximately 1 minute and 15 seconds into the call. Therefore, the shot in the air, which J.S. testified occurred before she contacted the police, necessarily occurred over a minute earlier than the shot into the car captured in the 911 call recording. Substantial evidence supports the trial court's finding that the length of time between the shots was sufficient for Kincherlow to reflect on his actions and step away from the situation. Indeed, according to J.S., during the period between the shots, Erick told Kincherlow repeatedly to go back into the house, specifically inviting Kincherlow to reflect and stop before Kincherlow fired again. He did not, and instead fired the final shot in Erick's general

direction, hitting the car. Just as in *Trotter*, the shots were "volitional and calculated," "posed a separate and distinct risk to [the victim or victims]," and increased Kincherlow's culpability. (*Trotter*, *supra*, 7 Cal.App.4th at p. 368.) The trial court did not err in imposing separate concurrent sentences in counts 6 and 7.

DISPOSITION

We reverse Kincherlow's conviction for assault with a firearm in count 2, and the corresponding enhancement for personal firearm use, and remand for further proceedings. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.